Supreme Court, U.S.

94-657

(3)

NO.: ?

IN THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

OCTOBER TERM, 1994

ROBERT LEE ZIMMERMAN,

PETITIONER

v.

BISHOP ESTATE, ET AL,

RESPONDANTS

ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Robert Lee Zimmerman
PRO SE
1830 Avenida Del Mundo #1702
Coronado, California 92118
(619)-435-2351

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ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 14,1994

Nos. 92-15764, 92-16408

D.C. No. CV-00086-ACK

NOT FOR PUBLICATION

Before: REINHARDT, LEAVY, Circuit Judges, and MERHIGE,* Senior District Judge.

Judge Leavy and Judge Merhige have voted to deny the petition for rehearing. Judge Reinhardt has voted to grant the petition for rehearing. Judge Reinhardt and Judge Leavy have voted to reject the suggestion for rehearing en banc, and Judge Merhige has so recommended.

The full court has been advised of the en banc suggestion

and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

* The Honorable Robert R. Merhige, Jr. Senior District Judge for the Eastern District of Virginia, sitting by designation.

ORDER GRANTING DEFENDANTS BISHOP ESTATE; BISHOP ESTATE TRUSTEES WILLIAM RICHARDSON, HENRY PETERS, OSWALD STENDER, MYRON THOMPSON AND MATSUO TAKABUKI; ELAINE DUNG; PETER BERTULFO AND PAUL CATHCART'S (UNSERVED) MOTION FOR SUMMARY JUDGMENT FILED APRIL 19, 1991

D.C. No. CV-00086-ACK

Defendants Bishop Estate, Bishop Estate Trustees, Elaine Dung, Peter Bertulfo, and Paul Cathcart's (unserved) Motion for Summary Judgment came on for a hearing at 1:30 P.M. on July 29, 1991, before The Honorable Alan C. Kay, with Michael L. Freed Esq. and Patricia S. Zell, Esq. present on behalf of Defendants Bishop Estate, Bishop Estate Trustees William

Richardson, Henry Peters, Oswald Stender, Myron Thompson and Matsuo Takabuki, and Elaine Dung, Peter Bertulfo, and Paul Cathcart (unserved) (collectively "KS/BE"); Lawrence Kumabe, Esq., present on behalf of the City and County of Honolulu Defendants ("City and County"); and Robert Lee Zimmerman ("Zimmerman"), present on behalf of himself, the Pro Se Plaintiff.

The Court having heard oral arguments, and considered the memoranda and exhibits of all parties, hereby enters the following Order Granting Defendants Bishop Estate, Bishop Estate Trustees William Richardson, Henry Peters, Oswald Stender, Myron

Thompson and Matsuo Takabuki, and Elaine Dung, Peter Bertulfo, and Paul Cathcart (unserved) Motion For Summary Judgment, Filed on April 29, 1991.

PROCEDURAL HISTORY

This lawsuit was filed on February 8, 1990 by Robert Lee Zimmerman against Defendants Bishop Estate, Bishop Estate Trustees, Elaine Dung, Frank Fasi, City and County of Honolulu, Douglas Gibb, Harold Kawasaki, P. Bertulfo, Tim Liu, Duke Aiona, W. Tedson, and K. Kanishero, arising form Zimmrman's arrest by police officers on November 1, 1988 for trespassing at property located at TMK 1-6-1-003-027 Kawailoa, Waialua, Oahu, Hawaii

("the Property").

On January 11, 1991, Zimmerman moved to amend his complaint; his motion was heard and granted on February 19, 1991; and the Order entered on April 1, 1991. On March 28, 1991, Zimmerman filed his First Amended Complaint. The First Amended Complaint added the following additional defendants:

1) Paul Cathcart;
2) Tedson Koja;
3) Captain B. Correa;
4) Lt. L. Wong;
5) Sgt. W. Cambra;
6) Sgt. K. Luke;
7) Sgt. T. Hirayama;
8) Officer G. Williams
9) Officer G. Goeas;
10) Officer G. Nihipali;
11) Officer J. Keanu;
12) Officer G. Witt.

The First Amended Complaint alleged the following causes of action:

Count I:	Violation of 42 U.S.C. Section 1983;
Count II:	Conspiracy to violate 42 U.S.C. Section 1983;
Count III:	False Arrest;
Count IV:	False imprisonment;
Count V:	Malicious prosecution;
Count VI:	Assault and battery:
Count VII:	Excessive force;
Count VIII:	Negligent and intentional infliction of emotional distress.

DISCUSSION

A. Standard for a Motion for Summary Judgment

Pursuant to Celotex Corporation v. Catrett, 477 U.S. 317, 322-23 (1986):

> [T]he plain language of Rule 56 (c) mandates the entry of

summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing of an essential element of her case with respect to which she has the burden of proof...

Zimmerman, as the Plaintiff and non-moving party faced with a properly supported summary judgment motion, has the burden of proof at trial and is required to make the Celotex showings in his opposition to the motion for summary judgment

He has completely failed to make a showing sufficient to establish the existence of essential elements to substantiate his case.

At the time of the hearing on this summary judgment motion, there were no pending discovery motions before Judge Alan C. Kay or Magistrate Bert S. Tokairin. The Court finds there has been adequate time for discovery. Additionally, the Court, by Minute Order dated June 17, 1991, continued the hearing on this motion in order to allow Plaintiff additional time to complete depositions. Discovery has been ongoing since March of 1990. As KS/BE's memorandum and oral arguments in this Court on

July 29, 1991 have demonstrated, Zimmerman has failed to establish the existence of elements necessary to sustain his suit against KS/BE. Therefore, summary judgment in favor of KS/BE and against Zimmerman is appropriate at this time.

B. The Federal Claim-Violation of 42 U.S.C. Section 1983

Zimmerman alleged in his First Amended Complaint that representitives of KS/BE, Elaine Dung (Brown), Paul Cathcart, and the Trustees of Kamehameha Schools/Bishop Estate, entered into a conspiracy with Peter Bertulfo, a Honolulu Police Department officer, and other employees of the City and

County of Honolulu to deprive Zimmerman of his constitutional right to be free from unreasonable search and seizure, a violation of the Fourth Amendment.

However, the facts clearly demonstrate that Zimmerman was the guest of James and Esther Kane, and that Mr. and Mrs. Kane were trespassers on the Property owned by KS/BE. As the First Circuit Court, State of Hawaii, declared in its January 4, 1990 Finding of Fact, Conclusions of Law and Order Granting Motion for Default Judgment and Summary Judgment for Ejectment in Civil No. 89-0319-02:

> ... TRUSTEES at all times relevent herein were the fee simple owners of certain real property

located at Kawailoa, Wailua, Hawaii, Tax Map Key 1-6-1-003-027 Portion, located at 61-151 Kamehameha Highway, more particularly described in Exhibit A attached to the Complaint...

... TRUSTEES are the fee simple owners of the Property described in Exhibit A to the Complaint and are entitled to exclusive possession and control of said Property...

... Defendants James Kane and Esther Kane have no right, title, or interest in or to the Property which is the subject of this action.

The evidence demonstrated that Kamehameha Schools/Bishop Estate never acquiesced in the Kane family's presence on the Property. As soon as KS/BE discovered the existence of the Kane family on KS/BE land, Kamehameha Schools/Bishop Estate, through correspondence as early as March

1988, notified the Kane family that they were trespassing and were not welcome on the Property. This continued through October 1988, at which time KS/BE believed the Kanes had left the Property. Then, after Peter Bertulfo became the caretaker of the Property and it appeared the Kanes had returned, he notified the Kane family, in person, on October 26, 1988 and October 31, 1988, that they were trespassing and were not welcome on the Property. The Kane family refused to vacate the premises.

Zimmerman claims that he was an invited guest of the Kane family on the morning of the arrests. The Kanes had no right to be on the

property. Zimmerman, as the guest of the Kane family, had no greater right to be on KS/BE Property than did the Kanes.

KS/BE was not the proximate cause of Zimmerman's alleged injuries. See generally King v. Massarweh, 782 f.2d 825 (9th Cir. 1986); Arnold v. IBM, 637 F.2d 1350 (9th Cir. 1981). The evidence amply demonstrated that KS/BE exercised no control over the police conduct or decision to arrest Zimmerman or Mrs. Kane. Neither Elaine Dung ("Dung"), KS/BE's representitive, nor Peter Bertulfo ("Bertulfo"), the caretaker of the Property, requested the arrest of anyone.

Furthermore, the police never consulted with Dung or Bertulfo about making the arrests. It is undisputed that the police consulted with their own counsel before arriving at the decision to arrest the trespassers.

Even if this Court were to find that KS/BE acted under color of state law, which this Court does not find, the actions of the police were proper and the arrest was lawful. On November 1, 1988, the date of the arrest, pursuant to Matlock permission, Kamehameha Schools/Bishop Estate via caretaker Peter Bertulfo had the authority and gave permission to the Honolulu Police Department to go on the

Property. See United States v. Matlock, 415 U.S. 164 (1974). Under such circumstances, no arrest warrant was necessary. Therefore, Zimmerman's arguments about "exigent circumstances" are irrelevant.

The police officers had probable cause to effectuate the arrest, because they saw Zimmerman and Mrs. Kane actively violating Haw. Rev State. Section 708-814, criminal trespass in the second degree. The police gave Zimmerman and the occupants of the structure the opportunity to leave the premises without consequences. However, Zimmerman voluntarily remained, realizing that if he did

so that he would be arrested. The arresting police officers followed statuatory procedures in making the arrest (Haw. Rev. State. Sections 803-5 and 803-6). Police conduct, according to the uncontroverted evidence, did not violate any of Zimmerman's federal or state civil rights.

Zimmerman had no "expectation of privacy" inside the structure on KS/BE property. Under Amezquita v. Hernandez-Colon, 518 F.2d 8, 12 (1st Cir. 1975) recognized in Hawaii case law in State v. Dias, 62 Haw. 52, 609 P.2d 637 (1980), neither Zimmerman nor the Kane family had a legal right to occupy the KS/BE Property or to build or

occupy structures upon it; "those faits accomplis could give rise to no reasonable expectation of privacy."

Because the police arrested Zimmerman pursuant to lawful authority, none of Zimmerman's civil rights were violated. Therefore, this Court grants KS/BE's Motion for Summary Judgment as to Count I and Count II of Plaintiff Zimmerman's First Amended Complaint.

C. State Constitutional Claims in Counts I and II

Zimmerman asserts in his first amended complaint that his rights under Article I, Sections 2, 5, 6, and 7 of the Hawaii State

Constitution were also violated. If a state constitutional claim is closely tied to the federal claims, this Court may exercise pendant jurisdiction to consider them. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

1. Section 2 of Hawaii Constitution

Section 2 provides:

> All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty, and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

Zimmerman has provided no argument as to why this provision has been violated, and there is nothing in the facts of this case upon which to base a claim under this section.

2. Section 5 of Hawaii Constitution

Section 5 provides:

> No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry.

The scope of this section is not necessarily limited by the

fourteenth amendment of the federal constitution. State v. Huelsman, 60 Haw. 71, 588 P.2d 394 (1979). However, the Court has found no Hawaii cases that interpret this section on facts similar to those in this case. Therefore, the Court looks to the fourteenth amendment of the United States Constitution for guidance. As discussed above, the fourteenth amendment does not provide due process protection in cases such as this, because Zimmerman had no protected property or liberty interest. See Amezquita, supra. See also State v. Dias, 62 Haw. 52 (1982) (squatters normally have no reasonable expectation of privacy,

even in structures they build, unless landowner acquiesces to the squatting for a considerable period of time).

3. Section 6

Section 6 Provides:

> The right of the people to privacy is recognized and shall not be infringed without a showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

The right of privacy provisions in this section are distinct from those in Section 7. State v. Okubo, 3 Haw. App. 396, 651 P.2d 494 (1984), aff'd, 67 Haw. 197, 682 P.2d 79 (1984). The provisions of Section 7 are discussed below, but it is clear

that the provisions of Section 6 only pertain to privacy in the informational and personal autonomy sense, rather than the right to be free of unreasonable search and seizure. State v. Lester, 64 Haw. 659, 649 P.2d 346 (1982). Zimmerman's claims are properly construed as claims under Section 7, not under Section 6.

Article I, Section 7 of the Hawaii constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the

communications sought to be intercepted.

The section is similarly worded to that of the fourth amendment of the United States Constitution, and United States Supreme Court cases guide courts in interpreting it. State v. Keaoha, 62 Haw. 166, 613 P.2d 645 (1980). The language "invasions of privacy" was added in 1968, and the right to privacy which it creates is limited to criminal cases. State v. Okubo, 3 Haw. App. 396, 651 P.2d 494 (1982), aff'd, 67 Haw. 197, 682 P.2d 79 (1984). Thus, Zimmerman appears unable to challenge the alleged interference with the privacy right created by this

section in this civil case. Even if he could, however, he has not demonstrated a reasonable expectation of privacy under this section. To have such a reasonable expectation, a person must have exhibited an actual, subjective expectation of privacy, and the expectation must be one that society is prepared to recognize as reasonable. State v. Ortiz, 4 Haw App. 143, 662 P.2d 517 (1983), aff'd, 67 Haw. 181, 683 P.2d 822 (1984). Zimmerman may have met the first prong of the test, but he has fallen far short of the second prong. See State v. Dias, 62 Haw. 52 (1982) (squatters normally have no reasonable expectation of

privacy, even in structures they build, unless landowner acquiesces to the squatting for a considerable period of time).

5. Count II--Conspiracy

Count II of the amended complaint alleges a conspiracy to violate Zimmerman's civil rights under the United States and Hawaii constitutions. Zimmerman states that he is not making a claim under 42 Section U.S.C. Section 1985 in this court, but rather, he is making a conspiracy claim under Section 1983. That claim was discussed above. Since Zimmerman had no protected privacy, liberty, orproperty interest, the only possible conspiracy would be a

conspiracy to lawfully arrest and charge trespassers. No claim under the Hawaii constitution is implicated in such a situation.

D. The Pendant Claims - Common Law Causes of Action

In the First Amended Complaint, Zimmerman alleged that his arrest on November 1, 1988 necessarily gave rise to the following common law causes of action against KS/BE:

1) Count III: False Arrest
2) Count IV: False Imprisonment
3) Count V: Malicious Prosecution
4) Count VI: Assault and Battery
5) Count VII: Excessive Force
6) Count VIII: Negligent and intentional infliction of emotional distress.

On June 6, 1991, in his Opposition to Defendants' Various Motions for Summary Judgment, Zimmerman withdrew Counts VI and VII for assualt and battery and excessive force. Therefore, summary judgment in favor of KS/BE as to those two counts is granted.

The arrest was legal; therefore, summary judgment in favor of KS/BE as to Counts III and IV, for false arrest and false imprisonment, is granted.

KS/BE had no involvement in the prosecution of Zimmerman; therefore, summary judgment in favor of KS/BE as to Count V, for malicious prosecution, is granted.

Because none of the actions of KS/BE were unreasonable or outrageous, summary judgment in favor of KS/BE as to Count VIII, for negligent and intentional infliction of emotional distress, is also granted. See, Wong v. Panis, 7 Haw. App. Adv. 414, 772 P.2d 695 (1989).

E. Zimmerman's Request to Amend His Complaint

Zimmerman's request in his Supplemental Opposition filed July 19, 1991, to amend his complaint is frivilous and is, therefore, denied. Such a request is dilatory and would prejudice all defendants. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1986).

F. Zimmerman's Request for Additional Discovery

Because further discovery in this case would be fruitless, Zimmerman's request in both his Opposition Memorandum filed June 6, 1991 and his Supplemental Opposition filed July 19, 1991, for additional time to do more discovery is denied. Furthermore, his affidavit fails to meet the requirements of Federal Rules of Civil Procedure, Rule 56(f), pursuant to the requirements in California Union Insurance Co. v. American Diversified Savings Bank, 914 F.2d 1271, 1278 (9th Cir. 1990); Continental Maritime v. Pacific Coast Metal Trades, 817

F.2d 1391, 1395 (9th Cir. 1987); and Hall v. State of Hawaii, 791 F.2d 759, 761 (9th Cir. 1986).

IT IS HEREBY ORDERED that KS/BE's Motion for Summary Judgment on Plaintiff's First Amended Complaint is granted.

DATED: Honolulu, Hawaii
Sep 03, 1991

Alan C. Kay
United States
District Judge

Robert Lee Zimmerman v. Bishop Estate, et al.; Civil No. 90-00086 ACK; Order Granting Defendants Bishop Estate; Bishop estate Trustees william Richardson, Henry Peters, Oswald Stender, Myron Thompson and Matsuo Takabuki; Elaine Dung; Peter Bertulfo and Paul Cathcart (unserved) Motion For Summary Judgment Filed April 29, 1991.

ORDER GRANTING DEFENDANT CITY'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT FILED MAY 24, 1991

This case is an action for declaratory and injunctive relief and damages by Plaintiff ROBERT L. ZIMMERMAN (Hereinafter "Zimmerman") under 42 U.S.C. Section 1983, alleging that his arrest on November 1, 1988, in a "squatter's" shack on property owned by the Bishop Estate (Tax Map Key 1-6-1-03: 027) violated his "right to privacy" under the Fourth Amendment and to due process of law under the Fifth and Fourteenth Amendments. He alleges that there is also an unlawful conspiracy against him in violation of 42 U.S.C. Sec. 1985. Finally, Zimmerman alleges that

there were a number of state torts committed against him.

City Defendants are seeking partial summary judgment on the federal claims, arguing that there is no evidence that Zimmerman's right to privacy was violated or any other constitutional or statutory right, based on the record before the Court.

The applicable law and the Arrests.

As to the City Defendants the framework for analysis is as follows: First, the Court must decide if any Fourth Amendment rights were implicated here. If Zimmerman's arrest in the "Squatter's" shack without a

warrant did not violate any clearly established law; i.e., if the police had "probable cause" to make the trespass arrests, then the individual defendants are protected by the doctrine of "qualified immunity" under Pierson v. Ray, 386 U.S. 547, 18 LEd.2d 288 (1967). The test for "probable cause" is "objective reasonableness;" i.e., a police officer will be liable only if no reasonable officer could conclude there was "probable cause" for the arrest. Malley v. Briggs, 475 U.S. 335, 89 L.Ed.2nd 271. Or, put another way, "probable cause" is based on the facts and the circumstances known to reasonable and prudent men, not legal

technicians or constitutional scholars. United States v. Allen, 629 F.2d 551 (9th Cir. 1929).

Next, if the police had "probable cause" to arrest Zimmerman for trespass, and were not individually liable for an unconstitutional arrest, then, Defendant City and County of Honolulu, is also not liable for any violation of 42 U.S.C. Sec. 1983, since neither City nor individual defendants can be said to have inflicted constitutional injury on Plaintiff. Palmeria v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986).

Briefly, the essential facts are as follows: The parcel in

question is owned by Defendants Kamehameha Schools/Bishop Estate. Its rights to the property are superior to the claims of Leihualani Kane and her husband, James Kane (hereinafter "the Kane's"). Full faith and credit can be given to the State circuit court decision, finding ownership in the Bishop Estate and rejecting the Kane's claims. See Takabuki v. Kane, et al (Civ No. 89-0319-02) (First Cir. 1989).

In early 1988, the Kane's moved onto the parcel. On March 25, 1988, Leihualani's father, Kamuela Price, wrote to the Estate asking that his daughter be appointed the "kahu" or caretaker

of the "heiau" there. On April 15, 1988, the Estate replied that it would not grant her such permission. Later that year, on about June 1, 1988, the Estate sent the Kane's a letter warning them that they were trespassing by residing on the property and that they had to vacate.

The letter was followed by visits by Elaine Dung Brown, the Bishop Estate land manager, assigned to the area, and by Peter Bertulfo, the caretaker appointed by the Estate. Bertulfo was a police officer., who handled the caretaker's chores while off-duty. On October 26, 1988, Brown and Bertulfo went to the shack and

warned the Kane's that they had to leave. The Kane's asked for another week to do so. Kane showed Bertulfo the April 5, 1988, letter from the Estate refusing them permission to stay there.

Five days later, on October 31, 1988, Bertulfo and Brown returned. Kane was warned to leave again. This time, she wanted another day to get ready to leave. The next day, November 1, 1988, Bertulfo and Brown returned. A couple of police officers met them there. The Kane's were warned by the police that they were trespassing. Other officers arrived. Prior to giving these warnings the police examined

various documents like the April 5, 1988, letter, the tax map of the area, showing the Bishop Estate as owner, and the City Building Department's Notice of Violation to the Estate for allowing an illegal shack to be built on the property without a building permit.

Zimmerman arrived at the scene. He was shown the documents and then retreated into the shack where the Kane's and some others were staying. The police warned the Kane's, Zimmerman and others in the shack repeatedly that they were trespassing. Some of them left. Kane and Zimmerman remained. Brown and Bertulfo were there throughout

this period as representitives of the Bishop Estate.

When they refused to leave, the police entered the shack and arrested Leihualani Kane and Zimmerman.

There are no "squatter's rights" under the Fourth Amendment, in Hawaii.

Without any right, title or interest in the property, the Kane's had no rights superior to that of the Bishop Estate, the lawful owner of the property. A mere possessory interest does not give them any rights superior to that of the true owner. As a result, the Kane's and Zimmerman were mere "squatters" or

trespassers on Bishop Estate property.

The leading case on squatters rights is Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975). Briefly, the case stands for the proposition that mere squatters as trespassers, have no Fourth Amendment rights to privacy while squatting in squatter's shacks on the property of another. If given adequate warning to vacate, they can be forcibly removed from the property and arrested for trespass without an arrest warrant and without implicating any constitutional rights under the Fourth or Fifth Amendments.

The Amezquita, rule has been adopted in Hawaii. State v. Dias, 62 Haw. 52 (1980). However, under Dias, it is crucial that squatters be adequately warned in advance of the arrests so they know their presence on the property is not being condoned by the landowner.

The court finds that this was done here. There were both written and verbal warnings, both by the police and representitives of the Bishop Estate. On at least two occasions, the Kane's acknowledged these warnings and agreed to leave. Zimmerman was likewise warned. Therefore, Zimmerman's Fourth and Fifth Amendment rights were not

implicated here, and there was no need for an arrest warrant.

Furthermore, Zimmerman's argument that an arrest warrant was needed is not the law in Hawaii. Where, as the court finds is the case here, an officer sees an infraction, such as a trespass occurring in front of him, he is entitled to make an arrests without a warrant. State v. Kapoi, 64 Haw. 130 (1981); Sec. 803-5, Hawaii Revised Statutes.

Zimmerman has also argued that Kane had an interest in the parcel, either as a result of bare possession of the shack or due to her "Hawaiian rights". Again, in view to the state court

proceedings, neither the Kane's or Zimmerman had any legal interest in the property sufficient to justify their presence there. Therefore, as mere trespassers and squatters they had no right to be there, no right to an arrest warrant, and the police had "probable cause" to arrest them.

In view of this finding, the court does not reach the issues of city liability if there was a pattern or practice of unconstitutional behavior, or for direct participation by a decisionmaker in an unconstitutional decision, since there was no constitutional injury in the first place.

Finally, there is no liability for conspiracy under 42 U.S.C. Sec. 1985, since neither politicians nor trespassers are within any class protected by that statute. There is simply no invidious class-based discrimination, such as racial discrimination here. Griffin v. Breckenridge, 403 U.S. 88, 29 L.Ed.2d (1971); Schultz v. Sanberg, 759 F.2d 714 (9th Cir. 1985).

CONCLUSION

For the reasons stated above, City Defendants' Motion for Summary Judgment will be granted. A reasonable jury could find that probable cause to arrest Plaintiff for trespass did exist. No warrant was needed, since he was a mere

trespasser. So, Plaintiff's Fourth and Fifth Amendment rights were no violated by his arrest in the squatters shack.

Counts I and II are dismissed as against the City Defendants, both for the same reasons that these counts failed against the Bishop Estate, see Order filed August 30, 1991, and, additionally, because qualified imunity protects the individual City Defendants. Further, the municipality is not liable because there is no evidence of a policy or custom which violated any of Zimmerman's rights.

Counts III, IV, V and VIII remain against the City Defendants.

Zimmerman's request to amend his complaint is frivilous and would add no meritorious claim and is therefore denied. Zimmerman's request for additional discovery time is also denied because further discovery would be fruitless, he has been given more than ample time already, and he has failed to meet the requirements of Rule 56(f).

IT IS SO ORDERED.

DATED: Honolulu, Hawaii,
Sep 26, 1991

United States
District Judge

ROBERT LEE ZIMMERMAN V. BISHOP ESTATE; CIVIL NO. 90-00086 ACK; ORDER GRANTING DEFENDANT CITY'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT FILED MAY 24, 1991

ORDER GRANTING DEFENDANT CITY'S THIRD MOTION FOR PARTIAL SUMMARY JUDGMENT FILED NOVEMBER 4, 1991 AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

D.C. No. CV-00086-ACK

Defendants FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu, the CITY AND COUNTY OF HONOLULU, DOUGLAS GIBB, in his former capacity as Chief of Police of the Honolulu Police Department and individually, HAROLD KAWASAKI, in his capacity as Acting Chief of the Honolulu Police Department, TEDSON KOJA, and KEITH KANESHIRO, in their capacity as Prosecutors for the City and County of Honolulu, and individually, (collectively referred to herein as

"City Defendants") Third Motion for Partial Summary Judgment and Plaintiff's Motion for Reconsideration came on for a hearing at 9:00 A.M. on January 6, 1992, before The Honorable Alan C. Kay, with Tracy Lowell Wolf, Esq. and Lawrence Kumabe, Esq., Deputies Corporation Counsel present on behalf of the City Defendants; Michael L. Freed, Esq., present on behalf of Defendants BISHOP ESTATE, BISHOP ESTATE TRUSTEES, ELAINE DUNG, PETER BERTULFO, and PAUL CATHCART, (unserved) (collectively Bishop Estate Defendants"); and ROBERT LEE ZIMMERMAN ("Zimmerman"), present on behalf of himself, the Pro Se Plaintiff.

The Court having heard oral arguments, and considered memoranda and exhibits of all the parties, hereby enters the following Order Granting Defendant City's Third Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Reconsideration.

INTRODUCTION

This case is an action for declaratory and injunctive relief and damages by Plaintiff Zimmerman inder 42 U.S.C. Section 1983, alleging that his arrest on November 1, 1988, in a "squatter's shack on property owned by the Bishop Estate (Tax Map Key 1-6-1-03: 027) violated his "right to privacy" under the Fourth Amendment

and to due process of law under the Fifth and Fourteenth Amendments. He alleged that there was also an unlawful conspiracy against him in violation of 42 U.S.C. Section 1985. Finally, Zimmerman alleged that there were a number of torts committed against him. More specifically, his first amended complaint alleged, inter alia, the following causes of action:

Count III:	False Arrest
Count IV:	False Imprisonment
Count V:	Malicious Prosecution
Count VI:	Assault and Battery
Count VII:	Excessive Force
Count VIII:	Negligent and Intentional Infliction of Emotional Distress

The City Defendant's Second Motion for Partial Summary Judgment filed May 24, 1991 was granted in

this Court's order filed September 30, 1991 dismissing Zimmermna's federal claims. In that earlier decision, the Court held:

1. There were no "squatters rights" under the Fourth Amendment in Hawaii.

2. Zimmerman and the Kanes were trespassers on the Bishop Estate property, and therefore, they had no reasonable expectation of privacy.

3. The squatters were given adequate warning in advance of their arrest for trespass.

4. Zimmerman's Fourth and Fifth Amendment rights were not implicated so there was no need for an arrest warrant.

5. The police had probable cause to arrest Zimmerman because he was a trespasser. The arrest was lawful.

DISCUSSION

In connection with Defendant City's third motion for partial summary judgment, the Court herewith elects to exercise its discretion to retain pendant jurisdiction over Plaintiff Zimmerman's state claims, recognizing that Plaintiff's federal claims have previously been dismissed. The Court grants the City's motion for summary judgment on the state tort and constitutional claims and

reiterates and incorporates its findings and conclusions of its earlier orders in this matter.

FALSE ARREST and FALSE IMPRISONMENT

Because Bishop Estate warned the Kanes of their trespass on Bishop Estate property on numerous occasions, there was no acquiescence by Bishop Estate in the occupation of the land by the Kanes. State v. Dias, 62 Haw. 52 (1980). There had been several demands to vacate the property, and Bishop Estate followed up in a diligent manner. As a consequence, no Fourth or Fifth Amendment rights were implicated.

Probable cause to arrest operates as a complete defense to

actions for false arrest and false imprisonment. The Court's finding of probable cause to arrest, likewise, precludes the City from being liable for the lawful actions of its police officers.

Assault and Battery and Excessive Force

The Court finds there has been no evidence presented to support Zimmerman's claims of assault and battery and use of excessive force.

Malicious Prosecution

To prevail on a malicious prosecution claim, Plaintiff must prove each of the following elements: termination of the prior proceeding in the Plaintiff's favor; maintenance of the prior

proceeding without probable cause to arrest; and initiation of prior proceedings with malice. The Court finds there was probable cause to initiate the trespass proceedings, and they were not intiiated with malice. Meyers v. City and County of Honolulu, 729 P.2d 388 (Haw. App. 1986), requires specific and extrinsic evidence on the issue of malice, and none has been produced by Plaintiff. Moreover, under Hawaii law, a city officer may not be held liable for malicious prosecution if he acts honestly and with ordinary discretion in commencing a prosecution against a person accused of a crime. Gaspar v. Nahale, 14 Haw. 574 (1903);

Arruda v. Morton, 17 Haw. 126 (1905).

Infliction of Emotional Distress

To prevail on a claim of intentional infliction of emotional distress, absent a physical injury, Plaintiff must demonstrate that the act was intentional; that it was unreasonable; that the actor should recognize that the act is likely to result in illness. The Court finds that the police had probable cause to arrest Plaintiff and did not act in an outrageous manner. The actions taken by the Defendants were legally justified.

Plaintiff's Motion for Reconsideration

A motion for reconsideration is granted if, one, there has been an intervening change of controlling law; two, new evidence is available; or, three, there is a need to correct clear error or prevent manifest injustice. Plaintiff has alleged none of these grounds in support of his motion for reconsideration, nor can any of his arguments be construed as alleging any of these grounds. Plaintiff has merely rehashed arguments already addressed by this Court in its previous orders.

Conclusion

The City Defendant's third motion for summary judgment is granted. Plaintiff's motion for reconsideration is denied. All Plaintiff's claims against both the City and the Bishop Estate Defendants are dismissed.

DATED: Honolulu, Hawaii
May 21, 1992

Alan C. Kay
United States
District Judge

Civil No. 90-00086 ACK, Robert Lee Zimmerman v. Bishop Estate, ORDER GRANTING DEFENDANT CITY's THIRD MOTION FOR PARTIAL SUMMARY JUDGMENT FILED NOVEMBER 4, 1990